No. 75-1089

In the Supreme Court of the United States

OCTOBER TERM, 1975

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a plea of not guilty to an indictment in the United States District Court for the Central District of California charging petitioner with willfully attempting to evade and defeat income taxes for 1970 and 1971, in violation of 26 U.S.C. 7201, petitioner moved to dismiss the indictment on the ground that a meeting between a government informant and his attorney in November 1972, approximately 21 months prior to indictment, violated his rights under the Fifth and Sixth Amendments to the Constitution. On the day the case was called for trial, a hearing was held on petitioner's motion and, after hearing evidence, the district court dismissed the indictment. The court of appeals reversed and remanded the case to the district court (Pet. App. A).

A petition for rehearing was denied on November 21, 1975 (Pet. App. B). The petition for a writ of certiorari was not filed until February 2, 1976, 73 days after the

denial of rehearing.[1] Thus, under Rule 22(2) of the Rules of this Court, the petition is substantially out of time. At any event, petitioner's claim that the Double Jeopardy Clause barred the government's appeal is without merit.

The pertinent facts are as follows: On December 5, 1974, petitioner's case was called for trial (Tr. 11).[2] At that time, a form indicating that petitioner was waiving trial by jury was presented to the trial judge (Tr. 11; Pet. App. A 1). The court then questioned petitioner whether his waiver was freely and voluntarily made and he assured the court that it was (Tr. 11-13; Pet. App. A 1). The court also questioned petitioner concerning two stipulations of fact which had been presented to the court (Tr. 13-15; Pet. App. A 1). After establishing that petitioner was fully aware of his right to confront and cross-examine all witnesses against him and of the effect of the stipulations, the court accepted the stipulations (Tr. 14-15; Pet. App. A 1).[3] The prosecutor then advised the trial court that there were certain pretrial motions for consideration (Tr. 15; Pet. App. A 1-2). After considering several other matters, an evidentiary hearing was held on the motion to dismiss the indictment because of the government informant's contact with petitioner's counsel.

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[1]On December 18, 1975, petitioner filed an application for an extension of time to and including January 19, 1976, within which to file his petition for a writ of certiorari. On December 23, 1975, Mr. Justice Rehnquist denied the application.

[2]"Tr." refers to the consolidated transcript of the arraignment proceedings and the hearing on the motion to dismiss the indictment.

[3]One of the stipulations was dated December 5, 1974 (Tr. 14). The court was unaware of the other stipulation, which had been filed November 29, 1974, until advised of its existence by defense counsel (Tr. 14-15).

The evidence adduced at the hearing established that in August 1972, Lynn Williams, a United States Customs agent, hired Tony Gordon as an informant to obtain information about petitioner's alleged narcotics smuggling activities (Tr. 29-30; Pet. App. A 2). The informant subsequently met petitioner and, at some point in time, petitioner suggested that Gordon meet with petitioner's attorney, Richard Sherman (Tr. 31-32; Pet. App. A 2). The alleged purpose of the meeting, which took place in November 1972, was to discuss an article that Gordon was writing about narcotics smuggling and the insulation of Gordon from any possible incrimination as a result of the article (Tr. 33, 37; Pet. App. A 2). Gordon informed Agent Williams of the scheduled meeting with Sherman, and although Gordon received authorization to meet with the attorney, he was given no specific instructions on what he should do (Tr. 32, 36-37; Pet. App. A 2). Gordon then met with Sherman (Tr. 33, 38; Pet. App. A 2).[4] At the meeting, Gordon advised Sherman that he was working as an informant for the United States Customs Service, which was investigating petitioner for smuggling cocaine. Gordon told Sherman that he would keep Sherman advised of the progress of the investigation in return for pay (Tr. 40, 43, 45, 50, 65, 66; Pet. App. A 2). Sherman tape-recorded the conversation with the informant (Tr. 35, 39-40).[5]

After Gordon met with Sherman, he was questioned by Agent Williams and two agents of the Internal Revenue Service (Tr. 38-40; Pet. App. A). Gordon admitted to the agents that he had told Sherman that he was employed as an informant (Tr. 43, 45, 66; Pet. App. A 2).

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[4]Sherman has represented petitioner throughout all of the proceedings in this case.

[5]Petitioner did not produce this recording at the evidentiary hearing.

Thereafter, Gordon was not utilized any further and had no additional contact with any case involving petitioner (Tr. 44, 75; Pet. App. A 2).

Although an agent of the Internal Revenue Service had met with Gordon sometime prior to Gordon's meeting with Sherman, the agent was not aware that Gordon was to meet with Sherman (Tr. 61-65; Pet. App. A 2). The agents of the Internal Revenue Service received no useful income tax information concerning petitioner from Gordon, nor did they receive any useful information from Gordon through Agent Williams (Tr. 33-34, 62-63, 67, 71-72, 76-78, 83-89; Pet. App. A 2). The indictment against petitioner was thereafter returned August 21, 1974 (Pet. App. A 2).

On these facts, the court of appeals concluded that the meeting between the government informant and petitioner's attorney 21 months before the return of the indictment was in the early stages of the Internal Revenue Service investigation and did not prejudice petitioner's rights. It therefore held that the district court erred in dismissing the indictment (Pet. App. A 5-6).

1. In *Serfass* v. *United States*, 420 U.S. 377, 388, this Court observed that "[i]n a nonjury trial, jeopardy attaches when the court begins to hear evidence." Relying upon the fact that after he had waived trial by jury, the district court accepted and ordered two stipulations of fact to be filed before ruling on the motion to dismiss, petitioner contends (Pet. 8-13) that jeopardy had attached prior to the entry of the dismissal order because the court had begun to "hear evidence" and, accordingly, the government's appeal was barred by the Double Jeopardy

Clause.[6] But the court of appeals correctly characterized this argument as a "mechanical formula" (Pet. App. A 5). Until the court in a nonjury trial actually begins to consider evidence on the question of guilt, there is no risk of a determination of guilt.

Here, the trial court never considered any evidence going to the question of guilt. The filings of the factual stipulations, prior to conducting any other proceedings, were unrelated to either the motion for dismissal or to the question of petitioner's guilt. Neither the court nor the parties intended that the factual stipulations would be considered by the court prior to the disposition of various pretrial matters and it is quite clear that the stipulations were never considered by the trial court in ruling upon the motion to dismiss. When the hearing on the motion to dismiss took place, petitioner had not as yet faced the risk of a determination of guilt and thereby been placed in jeopardy.[7] "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass* v. *United States, supra,* 420 U.S. at 391-392. Thus, the court of

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[6] 18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[7] In *Bunnell* v. *Superior Court*, 13 Cal.3d 592 (Cal. Sup. Ct.), relied upon by petitioner (Pet. 10-12), neither the parties nor the court contemplated any pretrial proceedings, and, indeed, the trial court had already read the transcript of the preliminary examination which the parties had submitted to the court as the basis for decision and had decided the defendant's guilt (13 Cal.3d at 599, n. 3). In those circumstances, the filing of the transcript presented the defendant with the risk of a determination of guilt.

appeals correctly concluded that petitioner "was not on trial when the district court dismissed the indictment" (Pet. App. A 5) and properly held that the government's appeal was not precluded by the Double Jeopardy Clause.

2. Petitioner further claims (Pet. 13-20) that the court of appeals erred in holding that his Sixth Amendment rights had not been violated. The meeting between Gordon and petitioner's counsel took place approximately 21 months prior to indictment and prior to any other formal prosecutorial proceedings. Accordingly, at that time, petitioner's Sixth Amendment right to the assistance of counsel had not yet attached and Gordon's contact with the attorney did not intrude upon any attorney-client relationship protected by the Sixth Amendment guarantee. See, *e.g., Kirby* v. *Illinois,* 406 U.S. 682, 688-690; *United States* v. *Ash,* 413 U.S. 300. Moreover, the meeting did not prejudice petitioner's rights. At the first and only meeting between the informant and Sherman, petitioner's lawyer, the informant immediately disclosed his role. As the court of appeals noted (Pet. App. A 6), "Sherman could hardly be expected to [have] disclose[d] prejudicial information after Gordon's revelation." The testimony of the agents that they received no information from the informant was uncontradicted, and neither here nor in the court below has petitioner claimed any prejudice other than the mere contact with his attorney. On these facts, the court of appeals correctly concluded that petitioner had suffered no prejudice.[8]

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[8]Petitioner argues (Pet. 17-19) that the conclusion of the court of appeals that no information from the meeting was utilized by the government fails to give proper deference to the findings of the district court. But the district court did not find either that information had been utilized or that the government had failed to establish that no information had been utilized. Instead, the district court held that the mere contact was an irremediable violation of petitioner's rights (Tr. 103-104; Pet. App. A 2-3), a conclusion contrary to *O'Brien* v. *United States,* 386 U.S. 345, and *Black* v. *United States,* 385 U.S. 26.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.